No. 88-171

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PETER W. HERZOG and JOAN L. HERZOG,
Appellants,

vs.

SAM J. COLDING, as Collier County Property Appraiser, and the DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA,
Appellees.

On Appeal from the Second District Court of Appeal, Lakeland Florida

APPELLANTS' BRIEF OPPOSING APPELLEES' MOTION TO DISMISS OR AFFIRM

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STATEMENT OF ISSUES

I. THIS APPEAL SHOULD NOT BE DISMISSED AS UNTIMELY IN THAT APPELLANTS' NOTICE OF APPEAL AND JURISDICTIONAL STATEMENT WERE FILED WITHIN 90 DAYS OF THE FINAL ACT OF THE SECOND DISTRICT COURT OF APPEAL OF FLORIDA, WHICH WAS ENTERED ON APRIL 27, 1988.

II. THIS APPEAL SHOULD NOT BE DISMISSED IN THAT A SUBSTANTIAL FEDERAL QUESTION HAS BEEN PRESENTED.

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ARGUMENT

I.

THIS APPEAL SHOULD NOT BE DISMISSED AS UNTIMELY IN THAT APPELLANTS' NOTICE OF APPEAL AND JURISDICTIONAL STATEMENT WERE FILED WITHIN 90 DAYS OF THE FINAL ACT OF THE SECOND DISTRICT COURT OF APPEAL OF FLORIDA, WHICH WAS ENTERED ON APRIL 27, 1988.

Initially, Appellees criticize Appellants for citing in the Notice of Appeal both the per curiam opinion of the Second District Court of Appeal of Florida and the court's Order denying their Motion for Rehearing En Banc or, in the Alternative, for Certification to the Supreme Court of Florida as a Question of Great Public Importance. Appellees contend that an order denying a a motion for rehearing is a non-appealable order and only the per curiam opinion could be appealed. Appellants, however, referenced both the opinion and the order of denial, being the last act of the highest court in Florida in which review could be had, to demonstrate not only that the time for filing this appeal had been tolled while the District Court of Appeal entertained the motion for rehearing en banc, but also that Appellants had extinguished their avenues for review in the Florida state courts.

Appellees also argue that Appellants' motion for rehearing en banc failed to toll the time for filing this appeal because it was a non-allowable motion and a nullity. Appellees rely on *State v. Kilpatrick*, 420 So.2d 868 (Fla. 1982) and *La Grande v. B & L Services, Inc.*, 436 So.2d 337 (Fla.Dist.Ct.App. 1983) and maintain that the courts therein considered circumstances identical to those present in the instant case. Actually, however, the facts before those courts differ in one significant aspect - the disposition of the motion for rehearing en banc by the district courts of appeal.

In both *Kilpatrick* and *La Grande*, the district courts of appeal refused to exercise jurisdiction over the motions for rehearing en banc and administratively dismissed the motions. *State v. Kilpatrick*, 420 So.2d at 868; *La Grande v. B & L Services, Inc.*, 436 So.2d at 337. The Florida Supreme Court in *Kilpatrick* stated:

> The en banc rule, by its express provisions, *does not require a district court to respond* to a request for rehearing en banc. If we accepted the state's contention, however, it

> would mean that the district courts of appeal would be compelled to respond, even though the rule clearly states a vote will not be taken on an en banc rehearing motion unless requested by a judge.

State v. Kilpatrick, 420 So.2d at 869 (emphasis added). In the present case, however, the Second District Court of Appeal *did respond* to Appellants' motion for rehearing en banc, even though not required to do so. The Second District Court of Appeal entertained Appellants' motion and held that "*upon consideration*, it is ORDERED that said motion is hereby *denied*." *See* Appendix B, Appellants' Jurisdictional Statement (emphasis added).

In *La Grande* the appellant's argument suggests that denials of rehearings en banc are treated differently than dismissals of rehearings en banc. The appellant had argued that the dismissal of his motion for rehearing en banc in *La Grande* should be given the same effect as was given to a denial of a motion for rehearing en banc in an unrelated case. Presumably, in the prior case, the denial had served as the act from which the time to appeal had begun to run and the appellant maintained that the dismissal should have the same effect. The court, however, disagreed. *La Grande v. B & L Services, Inc.*, 436 So.2d at 337.

The distinction is clear. An administrative mandate dismissing a motion for lack of jurisdiction is procedurally quite different from an order denying a motion upon consideration. Since the Second District Court of Appeal entertained and passed judgment on Appellants' motion, Appellants correctly relied upon this Order and considered this to be the final act of the court from which the time for appeal was to be measured.

II.

THIS APPEAL SHOULD NOT BE DISMISSED IN THAT A SUBSTANTIAL FEDERAL QUESTION HAS BEEN PRESENTED.

Appellees' argument in Section II of their motion indicates that they still have failed to recognize the constitutional deficiency of Florida's tax exemption. Appellees neglected to address in their Motion to Dismiss or Affirm in what way non-residents of Florida constitute a "peculiar source of the evil" at which the constitutional and statutory provisions in issue are aimed.

Appellees rely solely on *Rubin v. Glaser*, 416 A.2d 382 (N.J.), *appeal dismissed*, 449 U.S. 997, 101 S.Ct. 389, 66 L.Ed.2d 239 (1980) as they did in the Florida state courts. Realizing that Appellees would again analogize Florida's tax exemption to New Jersey's tax rebate, Appellants sought to distinguish this specious argument by drawing the Court's attention to the differing aspects of New Jersey's Homestead Rebate Act which allowed it to withstand constitutional scrutiny. Namely, the rebate act counterbalanced a corresponding income tax burden borne by New Jersey residents and the operation of the Homestead Tax Rebate Act was contingent upon the passage of the Gross Income Tax Act, both of which acts were enacted simultaneously. *Id.* at 387. Thus, the *Rubin* court recognized that tax burdens imposed on non-residents are only constitutional when they are in proportion to specific benefits conferred on non-residents or burdens shouldered particularly by residents. *Id.* at 385-86 (citing *Travelers' Insurance Co. v. Connecticut*, 185 U.S. 364, 22 S.Ct. 673, 46 L.Ed. 949 (1902)).

Appellants are not alone in recognizing the significance of New Jersey's Gross Income Tax Act on the validity of the Homestead Rebate Act. The Supreme Court of Massachusetts in *Massachusetts Council of Construction Employers, Inc. v. Mayor of Boston*, 425 N.E.2d 346 (Mass. 1981) cited *Rubin* for

the proposition that a "[s]tate may treat residents and non-residents differently for some tax purposes, if such treatment bears a close relation to extra taxes paid by residents in other contexts." *Id.* at 351; *see also Opinion of the Justices to the Senate,* 469 N.E.2d 821, 825 n.7 (Mass. 1984). This requirement that tax burdens and benefits must be borne proportionally by non-residents and residents is essential to the appropriate Privileges and Immunities inquiry articulated by this Court consistently since *Tappan v. Merchants' National Bank,* 19 Wall. 490, 22 L.Ed. 189 (1874). Florida's tax exemption fails to meet this constitutional standard.

Although Appellants discussed in their Jurisdictional Statement numerous Supreme Court cases in support of this argument for the invalidity of Florida's tax exemption, Appellees criticize Appellants for reliance on cases referred to in the Motion to Dismiss or Affirm as "right to transact business," "right to earn a livelihood" and "right to travel." Appellants reliance on such cases, however, was necessitated by the absence of any Supreme Court determination concerning the right to own a home in a state where one lacks citizenship. This void in the case law only demonstrates that the instant case presents a substantial federal question requiring this Court's attention and opinion on the merits. Florida's sole reliance on the *Rubin* case, though clearly in error, evidences how *Rubin* may be misconstrued and relied upon as precedent due to this Court's dismissal of that appeal for lack of a substantial federal question and the absence of any full opinion on this issue. Moreover, if the appeal in the instant case is dismissed for lack of a substantial federal question, this Court will be offering its stamp of approval to any taxing scheme preceded by the word "Homestead."

CONCLUSION

Appellants pray this Court to note probable jurisdiction in that the Notice of Appeal was filed within ninety days of Florida's final order denying Appellant's motion for rehearing en banc and because this appeal presents a substantial federal question for this Court's determination.

Respectfully submitted,

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